IN THE
SUPREME COURT OF THE UNITED STATES

No. 78-544

RUSSEL GIANGROSSO, et al.,

Petitioners,

v.

THE STATE OF LOUISIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF LOUISIANA

BRIEF OF THE STATE PUBLIC DEFENDER OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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The State Public Defender of the State of California hereby respectfully moves for leave to file the attached brief amicus curiae in support of granting of certiorari herein. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondents was requested but refused.

The California State Public Defender is an agency of California state government which is charged with the representation on appeal of indigent criminal defendants, including minors whose cases are heard by juvenile courts.

The basic structure of the Juvenile Court Law of California resembles that of Louisiana in that there is no provision for the trial of any issue pending before it (which may include anything from the placement of a destitute child to the determination of a charge of premeditated murder) to a jury.

Should certiorari be granted, the outcome will have a direct effect on the cases of many thousands of California juveniles who face trial and punishment in such courts each year. We thus seek leave to file the attached brief amicus curiae in support of the granting of certiorari in order to demonstrate that the significance of the particular issues raised by counsel for petitioners herein transcends the state of Louisiana alone, and that they are of great importance to the administration of justice in many

other states, including California. Specifically, we seek to argue that like Louisiana, California has made significant changes in its laws regarding the treatment of juveniles charged with major felony offenses since this Court's decision in McKeiver v. Pennsylvania (1971) 403 U.S. 528; and that such changes, which openly authorize the punishment of juvenile offenders, directly undercut the premises upon which McKeiver was decided, i.e., that since punishment was not an ostensible goal of the juvenile court, a jury was not an essential component of accurate factfinding. Certiorari should therefore be granted in order to re examine and clarify the McKeiver decision.

Respectfully submitted,

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE RIGHT TO TRIAL BY JURY MAY BE ARBITRARILY WITHELD FROM PERSONS FACING PUNISHMENT FOR ALLEGED CRIME MERELY BECAUSE THEY HAVE NOT ATTAINED A GIVEN CHRONOLOGICAL AGE

Counsel for petitioners has argued forcefully that Louisiana's response when a minor is accused of a serious criminal offense is substantially identical to its response when an adult is accused of similar conduct. It has been noted, for example, that the Louisiana Supreme Court has expressly recognized that both the nature of proceedings and the nature of consequences involved when a minor is accused of a serious offense are virtually indistinguishable from those visited upon an adult. (Pet. at 15, citing State In Interest of Dino (La. 1978) 359 So.2d 586, 596).

"A judicial proceeding which may result in the removal of a child from the custody of his parents and in his confinement until the age of twenty-one

years is not essentially different from a criminal trial. The purpose of the juvenile adjudicatory proceeding is to decide whether the accused is responsible for the prohibited conduct and, . . . the consequences may be in effect the same as in the case of an adult." (Ibid., 359 So.2d at 595.)

This candid recognition of the true nature of Louisiana juvenile proceedings is, of course, quite similar to this Court's unanimous recognition of the fact that a proceeding to determine whether a California juvenile was guilty of robbery was essentially criminal in that its consequences included both a deprivation of liberty and the imposition of moral stigma sufficient to warrant protection against double jeopardy. (Breed v. Jones (1975) 421 U.S. 519, 528, 529, 531.) "Under our decisions, we can find no persuasive distinction between [the instant] proceeding . . . and a criminal prosecution, each of which is designed to 'vindicate [the] very vital interest in enforcement of criminal laws'." (Ibid., 421 U.S. at 531; Cf. Gagnon v. Scarpelli (1973) 411 U.S. 778,

n. 12 at 789.)

A. Many States Have Abandoned Even Ostensible Adherence To The Idea That Allegations Of Serious Crime Should Be Dealt With In A "Protective Manner".

It is the purpose of this brief in support of the granting of a petition for certiorari to argue that there has indeed been a coalescence of public attitude around the proposition that where an adolescent is found guilty of a serious crime, the legal response should be punishment, i.e., confinement of the offender for the explicit purpose of quarantining him so as to protect the public. The idea that the public response to robbery, rape or murder by an adolescent should be limited to a mincing exhibition of concern for the offender's well-being has been well-nigh universally rejected by all segments of society. It follows directly from this state of affairs that this Court's holding in McKeiver v. Pennsylvania (1971) 403 U.S. 528, should be re-examined or clarified. It appears that the theoretical premises upon which

that decision rested, i.e., that the juvenile system existed to provide an "intimate, informal protective proceeding" (Ibid., 403 U.S. at 545) are no longer even ostensibly adhered to in many states, including Louisiana and including the nation's largest state, California. To leave McKeiver standing unclarified in the face of such changes would be to create the impression that invidious practices are being approved for the young simply because they are young; liable to adult-style punishment for their alleged wrongs, they are only entitled to fifth-rate "informal" factfinding procedures appropriate to such noncontroversial matters as the appointment of a guardian for an orphan.

This is something which we cannot assume the court intended by McKeiver; nevertheless, it is exactly how the decision is being read in many states.

For example, political leaders scanning the ideological spectrum all the way from Senator Edward M. Kennedy to President Gerald R. Ford have united in demands that "toughness" rather than

solicitude be shown serious juvenile offenders. (See, E. Kennedy, "Juvenile Crime: Justice Must Be Tougher", The Los Angeles Times, November 17, 1978, pt. II p. 7; "Ford Proposes Adult Punishment For Juveniles Who Commit Vicious Crimes", The Los Angeles Times, September 28, 1976, pt. I, p.5.) Joining the politicians has been a chorus of cries in local and national media for punitive crackdowns against youthful criminals. (See, e.g., Time magazine, July 11, 1977 (cover story) "Youth Crime"; J. Breslin, "Juvenile Justice: A Dark Victory (After Four Had Died, He Finally Lost The Ability To Terrorize New Yorkers)", The Los Angeles Times, July 27, 1977, pt. II, p.5.)

But what is most directly relevant is the fact that these expressions of public sentiment have been translated into legislation: changes in the express purposes of the juvenile court law to explicitly authorize the punishment of offenders. In 1975, for example, the California Legislature added[1/] the

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1. California Statutes 1975, Ch. 819.

following language to California Welfare and Institutions Code section 502 [now 202]:

"(b) The purpose of this chapter [i.e., the juvenile court law] is also to protect the public from the consequences of criminal activity, and to such purpose probation officers, peace officers, and juvenile courts shall take into account such protection of the public in their determinations under this chapter."

Another amendment to this code section[2] specified that a minor may be incarcerated "only when necessary for his welfare or for the safety and protection of the public". (Emphasis added.)

In California, a minor guilty of a serious offense is liable to be sentenced until age 23 [Calif. Welf. & Inst. Code § 1769(b)] to the California Youth Authority, a prison system for youthful offenders, wherein he will be housed with many adult persons convicted in regular

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2. California Statutes, 1976, Ch. 1071, § 4.

criminal courts[3] and where, most importantly, he will not even be under the direct care or supervision of the juvenile court. (In re Arthur N. (1976) 16 Cal.3d 226, 237-238; 545 P.2d 1345 .)

Recently, a California appellate court approved the commitment of a 13-year-old with no past record of imprisonment to the youth authority in reliance upon the legislative changes alluded to above, stating "This long overdue objective of juvenile justice [i.e., public protection] was correctly taken into account in deciding upon the commitment". (In re Gregory S. (1978) 85 Cal.App.3d 206, 213; _____ Cal.Rptr. _____ .)

The Youth Authority, of course, is statutorily enjoined to provide "training and treatment" (Calif. Welf. & Inst. Code § 1700), but so are California's notorious San Quentin and Folsom prisons.

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3. In addition to the mixing of young adults and juveniles within youth authority institutions, California statutes permit placement of youth authority inmates in various state prison facilities. (Cal. Pen. Code § 2035, 6126.)

(Cal. Pen. Code §§ 2022, 2032.)[4/] "Regardless of the purposes for which the incarceration is imposed, the fact remains that it is incarceration." (Breed v. Jones, supra, 421 U.S. n. 12 at 530.)

In view of the gravity of these consequences, both the California Legislature and Supreme Court have taken pains to point out that where an allegation of crime is disputed, there is to be no illusion of "informality" attached to the adjudicatory proceedings. (Calif. Welf. & Inst. Code § 680; Cal. Rules of Court, § 1313(c); People v. Superior Court (Carl W.) (1975) 15 Cal.3d 271, 275; 539 P.2d 807.) They are conducted "just like any other criminal . . . trial". (Ibid., 15 Cal.3d n.6 at 278; citing Thompson, California Juvenile Court Deskbook (1972) § 6.6.)

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4. California Penal Code section 2022: "The primary purpose of the California state prison at San Quentin shall be to provide confinement, industrial and other training, treatment, and care to persons confined therein."

B. Where The Community Demands Punishment For An Alleged Serious Crime, A Jury Is Essential To Accurate Fact-finding.

Where the purpose of a criminal proceeding is to adjudge a defendant to punishment and to uphold the community's right to protection from those guilty of crime, it is immaterial for purposes of the Sixth and Fourteenth Amendments whether the accused is above or below some arbitrary chronological age. It is material for the purposes of these amendments that where the public mood cries out for something other than the protective "coddling" of serious offenders, pressures to convict are brought to bear upon elected judges and other professional triers of fact which are as great or greater as those which led this Court to declare the right to trial by jury a fundamental right in Duncan

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v. Louisiana (1968) 391 U.S. 145.[5]

We can agree with this Court's reasoning in McKeiver v. Pennsylvania and the comparable (if a bit more floridly stated) reasoning of the California Supreme Court[6] that a jury might not be an essential component of accurate factfinding in

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5. Duncan, it should be recalled, involved a charge of simple battery against a 19-year-old youth which drew a sentence of 60 days and a $150.00 fine.

6. In re Daedler (1924) 194 Cal 320, 326; 228 Pac. 467 , a case involving murder, was the last California case to determine the right to trial by jury in other than dicta. It did so by applying the conclusions of an earlier case involving the placement of a destitute child in an orphanage. (Ex Parte Ah Peen (1876) 51 Cal 280.) It was easy in 1924 to equate a murder case with a guardianship proceeding in that there was then only one jurisdictional statute (former Calif. Welf. & Inst. Code § 700 [Cal. Stats. 1915, Ch. 631, § 700]) which contained 14 grounds of jurisdiction including being destitute, insane, truant, or frequenting pool halls. As the statutes cited in the text make clear, sharp distinctions have now been drawn between orphans and criminal offenders. (See Jury Trials for Juveniles, Rhetoric and Reality (1976) 8 Pac.L.J. 811.)

matters, such as the appointment of a guardian for an orphan, which are in fact benevolent, protective, and non-controversial in nature.

Even today, such reasoning might still be validly applied in some "criminal" juvenile proceedings -- a nine-year-old caught stealing bubble gum -- where the alleged offense is minor and there is in fact no thought of punishment. But where the court deals with an adolescent accused of a major felony such as rape, the consequences of conviction are as grave as sentence to the California Youth Authority, and where there is no meaningful appellate review[7], public demands for retribution and protection create a real possibility of conviction of the innocent which does make the jury an essential component of accurate factfinding; for all the reasons which have been so well elaborated since the

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7. See Donald & Dennis D. v. California, #78-817, Petition for Cert. filed November 14, 1978.

signing of the Magna Charta.[8/]

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8. One distinguished federal trial jurist has provided a contemporary elaboration of exactly how the jury does contribute to accurate factfinding:

"Sitting as a trial judge has reinforced my view that the greatest value of the jury is its ability to decide cases correctly. . . .

"A trial judge feels isolated when involved in his decision-making process. The kinds of group therapy and learning that takes place in jury deliberation are missing. He cannot talk with others. He may be uncomfortable, exposing tentative or incomplete thought processes to the lawyers. His clerk can help, but the relationship between the two makes it difficult for full value to be obtained from this exchange. . . . [Jurors] call to the attention of other jurors items of evidence that may have been forgotten or processes of decision making that have not been thought of by the others. . . . The result is more likely to be sound and correct." (Joiner, From the Bench, In Simon, The Jury System in America, 145, 146-147 (1976).)

CONCLUSION

Certiorari should be granted in this case to determine whether McKeiver v. Pennsylvania is to read as blanketly foreclosing enjoyment of the fundamental right of trial by jury to persons facing punishment for alleged serious criminal offenses merely because they have not attained a particular chronological age. Where there is no longer to be "an informal proceeding informed by sympathy and concern" which is "still attainable to outweigh the argument in favor of jury trials" (United States Ex Rel Murray v. Owens (2d Cir. 1972) 465 F.2d 289, 294, cert. den. 1972; 409 U.S. 1117) then that argument ought to prevail in the name of equal treatment; and above all in the name of accurate ascertainment of the truth or falsity of grave allegations of crime.

In sum, it is exactly as Mr. Justice White put it in his concurring opinion in McKeiver: "[The states] are also free if they extend criminal court safeguards to juvenile court adjudications, frankly to embrace condemnation

punishment and deterrence as . . . attributes of the juvenile justice system." (403 U.S. at 554; emphasis added.) The writ should be granted here so as to assure that minors facing charges in states which have embraced such goals receive something better than the worst of both worlds.

Respectfully submitted,

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